UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Southern Division

In re:	)	Bankr. No. 97-40270
	)	
WILLIAM C. MELLENBERNDT	)	Chapter 13
Soc. Sec. No. 503-36-3787	)	
	)	MEMORANDUM OF DECISION RE:
	)	IRS'S MOTION TO VACATE
Debtor.	)	CONFIRMATION ORDER

The matter before the Court is the Motion to Vacate Order of Confirmation filed by the Internal Revenue Service and Debtor's response thereto. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Memorandum of Decision and accompanying Order shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below, the Court concludes that the Motion should be granted.

SUMMARY OF FACTS

Debtor filed a Chapter 13 petition on March 25, 1997. On March 27, 1997, the Bankruptcy Clerk of Courts, through a national noticing center, served the Internal Revenue Service (IRS) at its Sioux Falls office with the Notice of Commencement of Case. The Notice stated the confirmation hearing would be held May 20, 1997 and that the last date to file an objection to Debtor's plan was five days before the confirmation hearing. Contrary to the Bankruptcy Clerk's usual procedure of adding the United States Attorney to the mailing list whenever the I.R.S. or Farm Service Agency are a creditor, the notice was not served on the U.S. Attorney.

In his schedules filed April 1, 1997, Debtor stated the IRS had a secured claim for $260,000.00. Debtor stated he did not have

any priority, unsecured claim holders.

The IRS filed a proof of claim on April 28, 1997. It stated it had an unsecured claim of $24,949.01, a secured claim of $95,592.34, and an unsecured, priority claim for $139,781.47, for a total claim of $260,322.82.

Debtor filed a plan on April 15, 1997. The plan stated that the IRS had a priority claim for $260,000.00. Debtor proposed to repay only $20,000.40 by making sixty monthly payments of $333.34 with no interest. The plan did not acknowledge that the IRS also had a secured claim. Debtor pledged to pay unsecured claim holders disposable income. There were no other plan payments. The plan was served on the IRS at its Sioux Falls, South Dakota office. The United States Attorney's office for the District of South Dakota again was not served.

Only the case trustee objected to Debtor's plan. He reported at the confirmation hearing that his objections had been resolved. A confirmation order was entered and served May 23, 1997. The United States Attorney's office was not served with the confirmation order.

Although the amount Debtor proposed to pay the IRS was not changed, Debtor's counsel acknowledged at the confirmation hearing that the IRS's claim totaled $260,332.82, as the proof of claim stated. The confirmation order did not reflect this corrected amount, however.

On June 4, 1997, the IRS filed a motion to have the confirmation order vacated. Therein, counsel for the IRS, an

Assistant United States Attorney, stated that he did not learn about the case until May 30, 1997 when a staff member found a request by the IRS for the U.S. Attorney to file objections to Debtor's plan. The request had been inadvertently clipped inside unrelated documents. The motion to vacate also included the basis for the IRS's objections to the plan, including that the plan violated 11 U.S.C. §§ 1322(a)(1) and 1325(a)(1) and possibly § 1325(a)(5).

A hearing on the motion to vacate was held July 8, 1997. Appearances included Trustee Rick A. Yarnall, A. Thomas Pokela for Debtor, and Assistant U.S. Attorney Craig P. Gaumer for the IRS. The Court gave Debtor and the IRS an opportunity to brief the matter. Upon receipt of the briefs, the motion to vacate was taken under advisement.

Debtor argued, in his brief, that the IRS's motion was not filed within a reasonable time, especially where the U.S. Attorney's office waited "several" days after learning of the oversight before filing the motion to vacate. Debtor argued that had the motion to vacate been filed promptly after the error was learned, it could have been considered within ten days after entry of the confirmation order; that is, before the confirmation order became final. Debtor also argued that any simple tickler system in the U.S. Attorney's office would have prevented the oversight.

The IRS argued in response that its counsel was unable to attend to the oversight more quickly due to deadlines and urgencies in other cases. The IRS also stated that the U.S. Attorney's

office does have a tickler system that works the majority of the time but that it failed here when the request to file objections got misplaced within other documents. Usually, when the U.S. Attorney's office receives a proposed plan, both the bankruptcy secretary and the bankruptcy attorney will enter the last date for objections on their respective calendars and will forward the pleadings to the IRS. The IRS will then notify the U.S. Attorney to file objections, if needed. If no notice is received by the last date for objections, the U.S. Attorney will presume that the IRS has no objections. The IRS further argued that equity does not favor Debtor where Debtor's confirmed plan violates the Bankruptcy Code because it does not provide for appropriate payment of the IRS's priority claim.

The IRS filed a second proof of claim on July 10, 1997. It stated it had an unsecured claim of $24,949.01, a secured claim of $95,592.34, and an unsecured, priority claim of $137,781.47, for a total secured claim of $255,322.82. On August 27, 1997, the IRS received relief from the automatic stay to sell a truck and trailer that it had previously seized from Debtor. Whether the sale of those items decreased the IRS's claim has not been disclosed to the Court.

DISCUSSION

Two clerical errors occurred which led to the U.S. Attorney's office failing to timely file an objection to Debtor's plan. First, the United States Attorney was not placed on the mailing list of creditors by the Bankruptcy Clerk's office, contrary to its

usual procedure. Second, the United States Attorney's office mislaid the IRS's request that the U.S. Attorney file an objection to Debtor's plan. The question thus becomes whether those errors constitute excusable neglect under F.R.Bankr.P. 9024 and F.R.Civ.P. 60(b).

Under F.R.Civ.P. 60(b), which is incorporated by F.R.Bankr.P. 9024, a court may relieve a party from a final order for "mistake, inadvertence, surprise, or excusable neglect[.]" The motion for relief must be made within a reasonable time and in any event not more than one year after the order was entered. Relief under Rule 60(b) is within a court's discretion and should be applied to maintain the integrity of the trial process. *MIF Realty L.P. v. Rochester Associates*, 92 F.3d 752, 755 (8th Cir. 1996)(citing *Rosebud Sioux Tribe v. A&P Steel, Inc.*, 733 F.2d 509, 515 (8th Cir. 1984)).

> Rule 60(b) is to be given liberal construction so as to do substantial justice and "'to prevent the judgment from becoming a vehicle of injustice.'" [*Rosebud Sioux Tribe*, 733 F.2d at 515](quoting *United States v. Walus*, 616 F.2d 283, 288 (7th Cir. 1980)). This motion is grounded in equity and exists to "preserve the delicate balance between the sanctity of final judgments . . . and the incessant command of a court's conscience that justice be done in light of all the facts." *Id.* (internal quotations omitted)(alterations in original). [Secondary source cite omitted.] One important equitable consideration is whether the litigants received a ruling on the merits of their claim. . . . We also consider whether any substantial rights of the nonmoving party have been prejudiced.

MIF Realty, 92 F.3d at 755-56. As defined by the Supreme Court, "excusable neglect" is an elastic concept. *Pioneer Investment*

Services Co. v. Brunswick Associates Ltd. Partnership, 113 S.Ct. 1489, 1496-97 (1993).[1] "[F]or purposes of Rule 60(b), 'excusable neglect' is understood to encompass situations in which the failure to comply with a filing deadline is attributable to negligence." *Id.* at 1497. The determination is essentially one of equity; all relevant circumstances surrounding the party's omission are considered. *Id.* These circumstances include the danger of prejudice to the other party, the length of delay and its impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith. *Id.* at 1498 (cite therein). Neglect by either the party or his counsel may be considered. *Id.* at 1499.

When all relevant circumstances are considered here, the Court concludes that excusable neglect occurred and that the IRS's objections to Debtor's plan should be heard on their merit. The United States Attorney's office did not get the usual notice of

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[1] In *Pioneer*, the Supreme Court defined "excusable neglect" in F.R.Bankr.P. 9006(b)(1) using a plain meaning analysis. The Court of Appeals for the Eighth Circuit applied Pioneer when considering the definition of "excusable neglect" in F.R.App.P. 4(a)(5) because it could find no basis for assuming that this plain meaning could be any different in another context. *Fink v. Union Central Life Ins. Co.*, 65 F.3d 722, 724 (8th Cir. 1995). For that same reason, *Pioneer*'s definition of "excusable neglect" is applied here when Rule 60(b) is considered with one caveat. Rule 60 contains other provisions that deal more directly with problems arising from acts of God or other circumstances beyond the movant's control. Since Rule 9006(b)(1) does not have those other provisions, the Supreme Court reasoned that "excusable neglect" under Rule 9006(b)(1) should include circumstances beyond the movant's control. *Pioneer*, 113 S.Ct. at 1498.

filing and the last date for objections to the plan, as it does in other bankruptcy cases in which the IRS or Farm Service Agency is a creditor. That the IRS's request for an objection got attached to another document in the U.S. Attorney's office was also mere negligence. There is no showing that the U.S. Attorney's office acted in bad faith. The length of delay in responding to the oversight was not as prompt as it should have been,[2] but was not unreasonable. *Federal Land Bank of St. Louis v. Cupples Bros.*, 889 F.2d 764, 766-67 (8th Cir. 1989). Debtor will not be prejudiced because he will not be required to do more than the Bankruptcy Code provides.[3] Other creditors will not be prejudiced because they too will still receive what the Code requires.

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[2] The United States Attorney for the District of South Dakota has several attorneys in her office. Surely one of them had time to file the Motion to Vacate Order of Confirmation within a day of the oversight coming to light.

[3] There is a debate whether Debtor could modify the IRS's claim through the plan without earlier filing an objection to the IRS's proof of claim. *See Sun Finance Co. v. Howard (In re Howard)*, 972 F.2d 639 (5th Cir. 1992); and *In re Moore*, 181 B.R. 522 (Bankr. Idaho 1995). The status of the IRS's lien also may not have been affected by confirmation since the IRS's secured claim was never considered by the Bankruptcy Court, *Harmon v. United States*, 101 F.3d 574, 581-82 (8th Cir. 1996), or "provided for" by the plan. *United States v. Hairopolulos (In re Hairopoulos)*, 118 F.3d 1240, 1243 (8th Cir. 1997). *Compare In re Siemers*, 205 B.R. 583 (Bankr. Minn. 1997); *Lunsford v. Vent (In re Vent)*, 188 B.R. 396 (Bankr. E.D. Ark. 1995); and *Kuebler v. Commissioner of the IRS (In re Kuebler)*, 156 B.R. 1012 (Bankr. E.D. Ark. 1993), *aff'd, Kuebler v. United States (In re Kuebler)*, 172 B.R. 597 (E.D. Ark. 1994). The Court does not decide those issues today. For a discussion on the conflict between the claims allowance process and the confirmation process, *see In re Rodnok*, 197 B.R. 232 (Bankr. E.D.Va. 1996), and *In re Basham*, 167 B.R. 903 (Bankr. W.D. Mo. 1994).

Finally and most important, the Court concludes that this confirmation order should be vacated because the plan does not appear to comply with the treatment of priority claims under § 1322(a)(2) and because it allows Debtor to sell property without notice of the proposed sale terms to creditors. Had the Court been made aware at the confirmation hearing that this plan does not appropriately provide for the IRS's priority claim, the plan would not have been confirmed. Further, Debtor's plan stated court approval for the sale of the warehouse would be obtained. Nothing at the confirmation hearing should have changed that provision because no notice of the change was given to creditors. Nonetheless, the confirmation order authorized Debtor to sell the property without pre-approval of the sale terms. Hence, even if excusable neglect by the Clerk and U.S. Attorney's office did not exist, the Court would vacate its confirmation order under 11 U.S.C. § 105(a) to insure that the provisions of the Code are carried out.

An appropriate order shall be entered.

Dated this 17th day of September 1997.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:
Charles L. Nail, Jr., Clerk
By: Deputy Clerk
(SEAL)

NOTICE OF ENTRY
Under F.R.Bankr.P. 9022(a)
Entered
SEP 18 1997
Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

CERTIFICATE OF SERVICE
I hereby certify that a copy of this document was mailed, hand delivered, or faxed this date to those creditors and other parties in interest identified on the attached service list.
Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota
By:
Date: 9-18-97

Case: 97-40270 Form id: 122 Ntc Date: 09/18/97 Off: 4 Page : 1
Total notices mailed: 6

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Aty Gering, Bruce J. Office of the U.S. Trustee, #502, 230 South Phillips Avenue, Sioux Falls, SD 57104-6321
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